72-1687

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-1687

DAVID MILLER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Petitioner David Miller prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, affirming the judgment of conviction rendered by the United States District Court for the Eastern District of Pennsylvania.

Opinion Below

The opinion of the Court of Appeals, not yet officially reported, is printed in the Appendix.

Jurisdiction

The judgment of the Court of Appeals was entered on April 3, 1973. An order denying a timely Petition for Rehearing was entered on May 16, 1973, and is printed in the Appendix.

Questions Presented

Whether the Court erred in failing to allow the Petitioner an opportunity to have an evidentiary hearing before the District Court in order that a determination could be made as to the voluntariness of his plea.

Constitutional and Statutory Provisions

United States Constitution, Amendment V:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Rule 11, Federal Rules of Criminal Procedure:

> "A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere.* The Court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of *nolo contendere* without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. If a defendant refuses to plead or if the Court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea."

21 U.S.C. § 176(a):

"Notwithstanding any other provision of law, whoever, knowingly, with intent to defraud the United States, imports or brings into the United States, marihuana contrary to law, or smuggles or clandestinely introduces into the United States marihuana which should have been invoiced, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported, or brought into the United States contrary to law, or whoever conspires to do any of the foregoing acts, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under § 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned for not less than ten or more than forty years and, in addition, may be fined not more than $20,000."

"Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury . . . ."

26 U.S.C. § 4755(b):

"Transportation. — Except as otherwise provided in this subsection, it shall be unlawful for any person to send, ship, carry, transport, or deliver any marihuana within any Territory, the District of Columbia, or any insular possession of the United States, or from any State, Territory, the District of Columbia, or any insular possession of the United States into any other State, Territory, the District of Columbia, or insular possession of the United States. Nothing contained in this subsection shall apply —

(1) to any person who shall have registered special tax as required by sections 4751 to 4753, inclusive;

(2) to any common carrier engaged in transporting marihuana;

(3) to any employee acting within the scope of his employment for any person who shall have registered and paid the special tax as required by sections 4751 to 4753, inclusive, or to any contract carrier or other agent acting within the scope of his agency for such registered person;

(4) to any person who shall deliver marihuana which has been prescribed or dispensed by a physician, dentist, veterinary surgeon, or other practitioner registered under section 4753 and employed to prescribe for the particular patient receiving such marihuana;

(5) to any person carrying marihuana which has been obtained by the person from a registered dealer in pursuance of a written prescription referred to in section 4742(b) (2), issued for legitimate medical uses by a physician, dentist, veterinary surgeon, or other practitioner registered under section 4753, if the bottle or other container in which such marihuana is carried bears the name and registry number of the druggist, serial number of prescription, name and address of the patient, and name, address, and registry number of the person issuing such prescription;

(6) to any person carrying marihuana which has been obtained by the person as a patient from a registered physician, dentist, or other practitioner in the course of his professional practice if such marihuana is dispensed to the patient for legitimate medical purposes; or

(7) to any United States, State, county, municipal, District, Territorial, or insular officer or official acting within the scope of his official duties."

26 U.S.C. § 7237(a):

"Where no specific penalty is otherwise provided. — Whoever commits an offense, or conspires to commit an offense, described in part I or part II of subchapter A of chapter 39 for which no specific penalty is othewise provided, shall be imprisoned not less than 2 or more than 10 years and, in addition, may be fined not more than $20,000. For a second offense, the offender shall be imprisoned not less than 5 or more than 20 years and, in addition, may be fined not more

than $20,000. For a third or subsequent offense, the offender shall be imprisoned not less than 10 or more than 40 years and, in addition, may be fined not more than $20,000.

Statement

After a trial by jury was half completed in the United States District Court for the Eastern District of Pennsylvania, Petitioner entered a plea of guilty to two of four counts charging him with crimes pertaining to marihuana in violation of 21 U.S.C. § 176(a) and 26 U.S.C. § 4755(b) and § 7237. Petitioner's Motion to Withdraw his guilty plea was denied without benefit of an evidentiary hearing and he was sentenced to imprisonment for a period of three years.

This is a case involving more than the simple situation where a defendant decides to appeal a case following a guilty plea. It involves broken promises by the Government and a Petitioner who has seriously jeopardized his safety and the lives of his family by keeping his part of the "bargain" with the Government. It is a case in which several governmental agencies are involved, and the procedural history is long and complex.

After numerous telephone conversations between the United States Attorney's Office in Philadelphia and defense counsel, the Petitioner, accompanied by his attorney, flew to the Philadelphia International Airport Motel and met with two United States Customs Agents and an Assistant United States Attorney. After a lengthy meeting, an agreement was made between the Petitioner and the Government whereby the Petitioner would prior to trial plead guilty to a non-mandatory count of the indictment in exchange for his assistance in making cases for the Government. It was further agreed that his sentencing would be postponed until January or February, 1972, to allow ample time for him to perform his part of the agreement. Additionally, the parties agreed that if the Petitioner made substantial contributions to the Government by way of producing cases, the Government would recommend to the Court that the Petitioner be granted

probation to enable him to continue to pursue his work for the Government. As an additional part of the agreement, the Petitioner would not be compelled to testify against his co-defendants at trial. At the conclusion of the meeting the Petitioner was requested immediately to begin working with United States Customs.

Except for a brief period of time when the Petitioner was bedridden with infectious hepatitis, he did everything possible to fulfill his part of the agreement. Agent Robert LaRatta, United States Customs in Philadelphia, Pennsylvania, who was working with the Petitioner, received information from the Petitioner pertaining to cases the latter was working on in the California area on August 20, 1971. Thinking the information supplied him was of value, Agent LaRatta suggested a conference with "higher-ups" in Washington, D.C. Subsequent to August 23, 1971, Agent LaRatta put the Petitioner in contact wtih Agent Rex MacMillan of United States Customs in Los Angeles, California. From September 2 through September 16, 1971, the Petitioner fully cooperated in his capacity as a special employee of United States Customs and the Bureau of Narcotics and Dangerous Drugs in California. In his capacity as a special employee, the Petitioner supplied valuable information concerning narcotics traffic in the United States, and as of the date of the sequestered hearing on November 12, 1971, United States Customs and the Bureau of Narcotics and Dangerous Drugs were making attempts to use the information he had supplied them. Some of the information supplied by the Petitioner led to the arrest and conviction of a Mr. Pearson in Federal Court in San Francisco, California, in August of 1972.

After the Petitioner had commenced performing his part of the agreement by jeopardizing his own life and expending his own funds as an undercover agent, the Government, through the Assistant United States Attorney, refused to live up to its promises. As early as August 17, counsel for the Petitioner sensed that the

Government was attempting to breach the agreement. From that date up to and including September 1, 1971, all conversations between counsel for the Petitioner and the United States Attorney were tape-recorded. Transcripts of the tapes were presented to the Court at the sequestered hearing, but because of subsequent developments in the case, they were not received in evidence. These tapes and testimony offered on November 11, 1971, before the Honorable Charles R. Weiner established that the Assistant United States Attorney refused to carry out his part of the agreement because his superior, the United States Attorney, ordered him not to perform. The tapes and the testimony at the hearing further demonstrated that the Assistant United States Attorney, characterizing himself as "docket counsel," felt that the Government's breach was unfair to the Petitioner, that it was not his decision to repudiate the agreement and the decision to repudiate was not based upon the fact that the Petitioner did not appear in Philadelphia on August 27, 1971 and change his plea to the non-mandatory count of the indictment.

Before all testimony was received by the Court at the sequestered hearing held on the 11th and 12th of November, 1971, trial commenced on November 15. The Petitioner, David Miller, appeared at trial on November 15, 16, 17, 18, 19, 22 and part of November 23, 1971, at which time he entered a plea of guilty. This time the Government drafted a written adhesion contract which required the Petitioner *inter alia* to testify in the pending case and plead not only to the non-mandatory count but also one mandatory count of the indictment. Additionally, as a condition precedent to this most generous offer, the Petitioner was compelled to withdraw *with prejudice* his motion to dismiss which was pending in the sequestered hearing. The Court, before accepting his plea of guilty, advised the Petitioner that by pleading guilty he was waiving his right to trial by jury and his right to confront and cross-examine his accusers. Nowhere in the record was the Petitioner apprised that by entering a plea of guilty he

was waiving his privilege against compulsory self-incrimination. When queried by the Court as to whether anyone from the Government had brought any pressure to bear on the Petitioner to extract the guilty plea, the Petitioner ritualistically responded "No." When asked, "Are you making this [plea] of your own volition?" the Petitioner obediently answered in the affirmative.

In the "adhesion contract," the Government permitted the Petitioner to continue on bail and sentencing was deferred until May 1972. The Petitioner, in spite of the Government's failure to perform as agreed, continued his cooperation with United States Customs and the Bureau of Narcotics and Dangerous Drugs.

On May 4, 1972, sentencing was held before the Honorable Charles R. Weiner at a closed hearing. The Petitioner, after fully realizing the magnitude of the unfair treatment he had received at the hands of the Government, moved to withdraw his guilty plea to the mandatory count of the indictment. The Court denied the motion on the grounds that it was not timely made.

Reasons for Granting Writ

The Petitioner in the District Court and Court of Appeals asserted a breach of an agreement by the Government as grounds for withdrawal of his guilty plea. The District Court held his request was not timely made and the Court of Appeals affirmed this position completely disregarding the Petitioner's contention that his cooperation with the Bureau of Narcotics and Dangerous Drugs and his expectation of leniency were the primary motives which led him to plead guilty. No evidentiary hearing was permitted by the District Court and such denial was affirmed by the Court of Appeals.

Both the District Court and the Court of Appeals laid heavy emphasis on the fact that the Petitioner had withdrawn, with prejudice, his Motion to Dismiss the indictment or, in the alternative, Motion to permit him to enter a plea of guilty to the non-mandatory count of the indictment. Neither Court held that Peti-

tioner was entitled to an evidentiary hearing. Yet, in *Fontaine v. United States,* ..... U.S. ....., 93 S.Ct. 1461, ... L.Ed.2d ..... (1973), this Court ruled that although the requirements of Federal Rules of Criminal Procedure 11 had been met, a Federal defendant was not absolutely barred from post-conviction relief. Unless it was conclusively shown by the record that no circumstances existed under which a Federal defendant could challenge his plea pursuant to Rule 11, he must have a hearing at the District Court level to ascertain the validity of his factual allegations concerning the involuntariness of his plea.

In the instant case, the Petitioner was completely stymied in his efforts to show total breach by the Government of its agreement. This is in utter disregard of the spirit and letter of *Santobello v. New York,* 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971).

Conclusion

For the foregoing reasons, the writ should issue.

Respectfully submitted,

FLYNN KIMERER THINNES
& GALBRAITH

By John J. Flynn
Thomas A. Thinnes
Attorneys for Petitioner

June, 1973

APPENDIX

UNITED STATES COURT OF APPEALS

For the Third Circuit

No. 72-1439

UNITED STATES OF AMERICA

v.

THOMAS PETER VALLEJO
CHARLES C. CORNET
NORMAN ROBERT KEIM
EDSON L. WHIPPLE
LEONARD MELVIN GLASSBERG
DAVID MILLER
DAVID MILLER, *Appellant*

(D. C. Criminal No. 71-229)

Appeal From the United States District Court
For the Eastern District of Pennsylvania

Argued December 8, 1972
Before Van Dusen, Gibbons and Hunter,
Circuit Judges

John J. Flynn, Esq.,
Michael D. Kimerer, Esq. &
Thomas A. Thinnes, Esq.,
Phoenix, Arizona
Attorneys for Appellant

Robert E. J. Curran, U.S. Attorney
Jeffrey M. Miller, Assistant U.S. Attorney,
Philadelphia, Pa.
Attorneys for Appellee

OPINION OF THE COURT
(Filed April 3, 1973)

Van Dusen, *Circuit Judge.*

David Miller appeals the May 22, 1972, district court order denying his motion to withdraw before sentencing his guilty plea to Count I of a five-count indictment.[1] Miller also contends that the court failed to comply with F. R. Crim. P. 11 when he was not advised of his privilege against self-incrimination and that this failure should render his plea invalid. We have carefully examined the record and conclude that each of these contentions is without merit. We therefore affirm.

The district court opinion fully sets forth the facts. See *United States v. Miller,* Crim. No. 71-229 (E.D. Pa. May 22, 1972). For our purposes, it is only necessary to briefly summarize the events that transpired prior to Miller's sentencing.

Miller had been indicted along with six others on charges relating to the illegal transportation of a ton of marijuana. After his arrest, Miller offered to act as an informer for the Government. On November 5, 1971, he filed a motion to dismiss the indictment against him, or, in the alternative, to permit him to enter a plea of guilty to a non-mandatory count of the indictment. His motion was premised on the claim that the Government breached its agreement to dismiss the charges against him. He alleged that the Government's promise had been made in return for his promise to act as an informer and to provide sufficient information that would lead to the successful prosecution of other persons involved in the sale and distribution of narcotics. The

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[1] Miller entered a plea of guilty to Counts I and V of the indictment. Count I charged him with conspiring to import marijuana in violation of 21 U.S.C. § 176(a). Section 176(a) specified a mandatory sentence. See *infra.* Count V charged a conspiracy to transport marijuana in violation of 26 U.S.C. § 4755(b), which does not contain a mandatory sentencing requirement.

Miller only sought to withdraw his plea to Count I.

Government opposed this motion, claiming Miller failed to perform his side of the bargain. A series of evidentiary hearings were conducted beginning on November 11, 1971, and continuing until November 23, 1971, where Miller produced evidence in support of his motion.

Meanwhile, the trial, with Miller and four other defendants, commenced on November 15 and continued on a daily basis until December 3. However, on November 23, 1971, Miller, in the presence of the court and his counsel, agreed to withdraw his motion, with prejudice, and requested leave of the court to change his not guilty plea to Counts I and V of the indictment to guilty. The court accepted his plea. Sentencing was postponed from February 24, 1972, until May 4, 1972. On the day of sentencing, Miller presented the court with a motion to withdraw his guilty plea pursuant to F. R. Crim. P. 32(d).[2]

Although Rule 32(d) does not establish a standard governing the withdrawal of a plea prior to sentencing,[3] the district court may, in its discretion, permit a defendant to substitute a plea of not guilty "if for *any reason* the granting of the privilege seems *fair and just. . . .*" *Kercheval v. United States,* 274 U.S. 220, 224 (1927) (emphasis supplied); *United States v. Young,* 424 F.2d 1276, 1279 (3d Cir. 1970). However, this is not an absolute right to be made in a vacuum without reference to surrounding circumstances. See *United States v. Stayton,* 408 F.2d 559, 561 (3d Cir. 1969); *cf. United States ex rel. Culbreath v. Rundle,* 466 F.2d 730 (3d Cir. 1972).

Acceptance of a motion to withdraw a plea of guilty lies within the sound discretion of the trial court and its determination will

[2] Rule 32(d) provides, *inter alia:*
"A motion to withdraw a plea of guilty . . . may be made only before sentence is imposed or imposition of sentence is suspended. . . ."

[3] Compare a Rule 32(d) motion to withdraw a plea of guilty prior to sentence with the standard after sentence is imposed. ". . . [T]o correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea."

only be disturbed where it has abused its discretion, *United States v. Stayton, supra* at 561. There has been no abuse of discretion in denying Miller's motion to withdraw his guilty plea. The trial court properly considered the substantial prejudice that would have resulted to the Government if Miller's motion had been granted. It noted:

> "Witnesses for the government who were presented in opposition to the defendant's motion to dismiss the indictment and who were trial witnesses had been assembled to appear in Philadelphia from several far western and southwestern states. Testimony most damaging to the defendant and which resulted in guilty verdicts against co-defendants had been received in evidence prior to the defendant's change of plea.
>
> "Finally it appears appropriate to again point out that Miller changed his plea on November 23rd, 1971. He waited until the day of sentencing, a time factor of almost six months, before filing the motion under consideration." *United States v. Miller, supra* at 7.

Furthermore, Miller's request to withdraw his plea appears to be merely a reassertion of the same allegations raised in his earlier motion. Miller withdrew that motion with prejudice on the advice of his counsel on the basis of a carefully worked out stipulation between him and the Government. Nevertheless, he claims that at the time he entered his plea of guilty to the mandatory count of the indictment, he relied upon *United States v. Stephens*, 449 F.2d 103 (9th Cir. 1971), which provided that one who was convicted before the effective date (May 1, 1971) of 21 U.S.C. § 844(a) and (b) (The Comprehensive Drug Abuse Prevention and Control Act of 1970), but sentenced after such effective date, could receive less than the sentence provided under 21 U.S.C. § 176(a) and 26 U.S.C. § 7237(d). 21 U.S.C. § 176(a) specified mandatory sentences of not less than five, nor more than twenty, years. The new Act does not prescribe any mandatory minimum sentence and permits the grant of probation. After

Miller entered his plea and prior to March 11, 1972, the Second Circuit, in *United States v. Fiotta,* 454 F.2d 252 (2d Cir. 1972), and the First Circuit, in *United States v. Bradley,* 455 F.2d 1181 (1st Cir. 1972), aff'd, ... U.S. ...., 41 U.S.L.W. 4368 (3/5/73), rejected the rationale of *Stephens.*[4] The Supreme Court in *Bradley* stated (4369 of 41 U.S.L.W.):

> "The district judge had no power to consider suspending petitioners' sentences or placing them on probation. . . . The mandatory minimum sentence of five years must therefore be imposed on offenders who violated the law before May 1, 1971. And Congress specifically provided that section 4208(a) does not apply to any offense 'for which there is provided a mandatory penalty.'"

We note that Judge Adams' opinion in *United States v. Caldwell,* 463 F.2d 590 (3d Cir. 1972), relied, in part, on the reasoning of the Supreme Court of the United States in *Bradley, supra.*

A change in the law subsequent to the entry of a guilty plea is not, in and of itself, a ground for its withdrawal, where the plea is knowingly entered on the advice of counsel. See *McMann v. Richardson,* 397 U.S. 759, 773-74 (1970); *Brady v. United*

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[4] The Supreme Court in *Bradley v. United States, supra,* granted the petition for writ of certiorari in order to resolve the conflict between the First and Ninth Circuits. Our decision in *United States v. Caldwell,* 463 F.2d 590 (3d Cir. 1972), relying on the reasoning of the First Circuit opinion in *Bradley* is in accordance, with the Supreme Court's decision and held that the penalties prescribed by 26 U.S.C. §§ 4705(a) and 7237(b) and (d) are preserved for prosecutions commencing prior to May 1, 1971, even though the sentence was imposed after that date.

The issues discussed by the Court in *Bradley* were whether the trial court may impose a sentence of less than the mandatory minimum sentence prescribed by 26 U.S.C. §§ 4705(a) (1964 ed.) and 7237(b) (1964 ed. and Supp. V), suspend the sentence, place the offender on probation, or specify that he be eligible for early parole, where that offender had been convicted of a federal narcotics offense committed before May 1, 1971, but sentenced after that date. See *id.* at 4368. The reasoning of *Bradley* establishes that the District Judge in this case had no choice but to impose sentence on Count I in accordance with the five-year mandatory minimum sentencing requirements of § 176(a) (see also 26 U.S.C. § 7237(b) and (d), which were in effect prior to May 1, 1971.

States, 397 U.S. 742, 757 (1970). While Miller may have harbored a wistful hope that he would be sentenced to less than five years, the court made abundantly clear prior to accepting the guilty pleas, as the following colloquy indicates, that he knowingly ran the risk of a substantial jail sentence and fine:

"Q. Are you pleading guilty because you are in fact guilty to the two counts?
"A. Yes.

"Q. What is the maximum?
"A. Thirty years.

"Q. What is the fine?
"A. Thirty-five thousand dollars.

"Q. Knowing that you wish to enter the plea?
"A. Yes.

"Q. Has anybody brought any pressure to bear on you from the government?
"A. No.

"Q. Anyone made any promises of leniency from the government or anywhere else?
"A. No, sir.

"Q. Anybody told you what I am going to do with you?
"A. No, sir.

"Q. Are you making this of your own volition?
"A. Yes."

(N.T. 56, Nov. 23, 1971)

Therefore, we are unable to say the district court abused its discretion when it denied Miller's request.

The defendant's other contention that Rule 11 of the Federal Rules of Criminal Procedure and *McCarthy v. United States*, 394 U.S. 459 (1969), required the trial court to advise him of his privilege against self-incrimination is equally without merit. *McCarthy* did not require the courts to develop a litany, or fixed formula, when addressing a defendant; but, rather, requires the courts "to inquire into the defendant's understanding of the

nature of the charge against him, and whether the defendant possesses an understanding of the law in relation to the facts." *United States v. Cantor*, 469 F.2d 435, 438 (3d Cir. 1972).

This court, in *Davis v. United States*, 470 F.2d 1128 (3d Cir. 1972), rejected a similar contention that a failure to specifically advise a defendant of his privilege against self-incrimination invalidated his plea. In *Davis* we held that ". . . once the court has satisfied itself . . . that the guilty plea was made knowingly and voluntarily, an independent warning against self-incrimination becomes unnecessary." *Id.* at 1132. The record makes clear that the defendant acted knowingly and voluntarily with full realization of the effect of his plea.

The district court judgment of conviction will be affirmed. However, the illegal three-year sentence on Count I[5] will be vacated and the case will be remanded to the district court for sentencing on both Counts I and V in accordance with *Bradley v. United States, supra.*

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

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[5] Miller was sentenced on May 4, 1972, on Count I to three years' imprisonment. The sentence of three years under Count I does not conform with our decision in *Caldwell, supra*, or the recent Supreme Court decision in *Bradley, supra*. See note 4.

UNITED STATES COURT OF APPEALS
For the Third Circuit
No. 72-1439
UNITED STATES OF AMERICA
v.
THOMAS PETER VALLEJO, CHARLES C. CORNET, NORMAN ROBERT KEIM, EDSON L. WHIPPLE, LEONARD MELVIN GLASSBERG, DAVID MILLER
DAVID MILLER, *Appellant*
SUR PETITION FOR REHEARING
Present: SEITZ, Chief Judge, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER and WEIS, Circuit Judges.

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

(sgd.) Francis L. Van Dusen
Judge

Dated: May 16, 1973